IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 329 OF 2004

Oil and Natural Gas
Commission Ltd., .. Petitioners.

vs.

Garware Shipping Corporation
Ltd., .. Respondents.

Mr. Rajeev Kumar with Mr. S.A. Bhalwal
i/by M/s. Vyas & Bhalwal
for the petitioners.

Mr. R.M. Kadam with Mr. B.B. Saraf with
Ms. Payal Daftari with Mr. Onkar
Warange with Ms. Ketki Furia
i/by Shaunak Satpute & Co.
for respondents.

CORAM : S.U.KAMDAR, J.

DATE : 7th DECEMBER, 2004.

ORAL JUDGMENT :

1. By the present petition the petitioners are challenging the award dated 29.4.2004 under Section 34 of the Arbitration and Conciliation Act, 1996.

2. Some of the material facts in the present

case, briefly enumerated, are as under :-

3. On 1.10.1983 pursuant to the representation made by the Indian National Shipping Owners Association (INSA) it was decided that new agreement for charter hire rate should be entered into so as to enable adequate earning to the Indian ship owners. It was suggested by INSA that formal contract based on reasonable margin of profit and international time charter rate with an appropriate safe-guard should be provided for by and between the INSA and ONGC. On 18/8/1984 the Government of India issued a directive to the petitioner directing that necessary action for entering into the formal contract with Indian Shipping Owner on the basis of the General Price preference policy should be taken by the petitioner herein. On 1/8/1984 the petitioner introduced five vessels of the respondent Corporation and inducted in operation. On 3/10/1984, between the petitioner and the respondent five charter party agreements were executed inter alia providing that the said five vessels shall be hired for a period of five years at the daily charter rate stipulated in the agreement. The said period of five years was completed on 6/11/1988, 14/12/1988, 18/1/1989, 1/3/1989 and 19/3/1989. On 31/1/1989, Government of India through Ministry of Petroleum addressed a letter to the petitioner to extend the methodology of fixing the charter rate of

Indian Shipping Companies for a further period of three years. On 13.6.1989, the Government of India informed the petitioner that the matter has been considered by the Ministry and inter alia pointed out that there may be change in the methodology in computation of charter rate agreements by and between the parties. It was proposed that the rates may be applicable for five years from the date of expiry of the said term and operating charges to be based on actual operating expenses of the petitioners' vessels as per the audited accounts for 1987-88 and for the subsequent period they should be granted 5% escalation. In October, 1989, the Government of India appointed the Additional Secretary and Financial Adviser Mr. Shiva Subramanium as a one man committee and he submitted his report on 1.2.1990. The Government of India by a letter dated 17/11/1990 directed the petitioner hereto to accept the said Shiva Subramanium report and implement the same accordingly.

4. On 18/1/1993, another Committee was appointed by Ministry of Surface and Transport of the Government of India, namely, Dr. Saxena Committee to review the operating cost payable to the Offshore Vessels. On 16/4/1993 a meeting was held by the Secretary to the Ministry of Surface Transport with the petitioner herein and the petitioner was directed to initiate action for

extending contracts for all 25 Offshore Vessels beyond the aforesaid five years period. Thus, by virtue of the said direction, the petitioner was required to extend the period further after expiry of second five years term. The second five years term in so far as the five vessels of the respondents are concerned, expired as under :-

Garware I	07/11/1993
Garware II	15/03/1993
Garware III	19/01/1994
Garware IV	02/03/1994
Garware V	20/03/1994

Similarly as in the case of the respondent herein there were other ship owners whose vessels were also hired by the petitioner for the purpose of carrying out various operations. One of such company was the Shipping Corporation of India. In respect of all these companies, the period of extension was granted subsequent to the expiry of five years on 16.3.1995. The Second Saxena Committee was constituted to determine the daily charter rate for the period of 12th year and subsequent thereafter i.e. 13th to 16th year. On 14/9/1995 certain additional terms of the reference were framed and referred to the Second Saxena Committee. The INSA was represented before the said Second Saxena Committee and necessary details were furnished by the said INSA which is the

Association of the Indian ship owners. The Second Saxena Committee submitted its report on 14.9.1997 and the said report was directed to be implemented by the Government of India by their communication dated 15.6.1998.

5. However, it seems that still there were certain issues pending between the petitioner and the various independent shipping companies and, therefore, the matter was referred to High Level Working Group to resolve the said pending issues. The High Level Working Group has submitted its report to the Government of India and the same has been accepted by the Government of India by their recommendations dated 7.3.2000

6. It is under this report of the Second Saxena Committee and the High Level Working Group that the respondents raised certain claims pertaining to the repair and maintenance expenses including over head expenses for the 11th and 12th year and consequential relief was also sought for subsequent years i.e. for 13th to 16th years of the said operations. In view of the non-acceptance of the claim of the respondent and refusal of the petitioners to grant the said claims as based on Second Saxena Committee report read with High Level Working Group report, the respondent herein filed a writ petition in this Court being Writ Petition No.

2788 of 2001. The said writ petition inter alia contained the following prayers :-

(a). that this Hon'ble Court be pleased to declare that the Petitioners are entitled to have the repair & maintenance expenses including corresponding OH expenses for their 11th and 12th years viz. 1994-95 and 1995-96 respectively to be determined on the basis of the corresponding figures for the 11th and 12th years of operation of the SCI's vessels i.e. for 1995-96 and 1996-97 and to read down the recommendations in the High Level Working Group (Exhibit 'C' hereto) to that effect;

(b). that this Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction calling for the records of the Petitioners' case and after going through the legality, validity and propriety thereof, be pleased to quash and set aside the action and/or inaction on the part of the Respondents in not paying to the Petitioners the

repair and maintenance expenses including corresponding OH expenses for their 11th and 12th years viz. 1994-95 and 1995-96 on the basis of the corresponding figures for 11th and 12th years of the operation of the SCI's vessels i.e. 1995-96 and 1996-97 and in not paying to the Petitioners the arrears of the R&M expenses and the corresponding overhead expenses on the differential amount in the sum of approx. Rs. 6.73 crores as per 'Exhibit G' hereto.

(c) that this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction directing the Respondents to forthwith pay to the Petitioners the 'repair and maintenance expenses including corresponding HO expenses for their 11th and 12th years i.e. 1994-95 and 1995-96 on the basis of the corresponding figures for the 11th and 12th years of the operation of the SCI's vessels i.e. for 1995-96 and 1996-97 and to forthwith pay to the Petitioners a sum of approx. Rs.6.73

crores the particulars of which are set out in Exhibit 'G' together with further interest @ 12% p.a. till date of payment.

(d) that pending the hearing and final disposal of the above Petition, the Respondents be directed to forthwith pay to the Petitioners the repair and maintenance expenses including corresponding OH expenses for their 11th and 12th years i.e. 1994-95 and 1995-96 on the basis of the corresponding figures for the 11th and 12th years of the operation of the SCI's vessels i.e. for 1995-96 and 1996-97 and to forthwith pay to the Petitioners a sum of approx. Rs.6.73 Crores, the particulars of which are as set out in Exhibit 'G' hereto together with further interest @ 12 % p.a. till date of payment.

(e) for interim and ad interim reliefs in terms of prayer clause (c) and (d) above;

(f) for costs of the petition;

(g) for such other and further reliefs as the nature and circumstances of the case may require.

7. This Court by an order dated 2.12.2001 has referred the issues raised in the said writ petition before the Arbitrator Mr. Justice M.L. Pendse, (retired Chief Justice of Karnataka High Court and retired Judge of this Court). The matter was heard by the learned Arbitrator after the pleadings were filed by and between the parties and the learned Arbitrator has passed the impugned Award. By the said Award, the learned Arbitrator has held that the respondents are entitled to a sum of Rs. 4,66,15,828/- towards the difference in respect of repair and maintenance expenses in respect of five overseas vessels for the 11th to 16th years of their operation. It has been also directed that the petitioner should pay to the respondent interest at the rate of 9% per annum on the principal amount of Rs. 4,66,15,828/- with effect from 5.2.2002 till payment and/or realisation. It is this award which is the subject matter of challenge before me.

8. Mr. Rajeev Kumar, the learned counsel appearing for the petitioner urged before me two submissions for challenging the award. It has been contended by him that the policy of the Government

reflected in the Second Saxena Committee report and the High Level Working Group is binding on the petitioner and consequently also binding upon the respondent herein and it is not permissible for the respondent to alter the said terms and conditions of the report and/or recommendations made by the Second Saxena Committee and/or the High Level Working Group constituted in respect of the issues pertaining to the payment of repair and maintenance charges for a period subsequent to the Second Five year term.

9. The learned counsel for the petitioner has also contended before me that the Arbitrator has not considered the arguments advanced by the petitioner particularly in respect of the determination of the basis on which the operating expenses should be computed and thus, the arbitrator is in error and has not exercised the jurisdiction vested in him and/or that the Arbitrator has given no reason in respect of rejecting the argument of the petitioner and, therefore, the award is liable to be quashed and set aside.

10. Thereafter the learned counsel for the petitioner contended that the Arbitrator in his award did not advert to the conclusion of the Second Saxena Committee as well as the High Level Working Group and has substituted of his own daily charter rate and fixed the rate by himself which is not permissible as

the Arbitrator being the creature of contract is bound by the terms and conditions of the contract and cannot travel beyond the same. It has been contended that since under the terms of the contract executed by and between the parties the formula provided by the Second Saxena Committee and the High Level Working Group is legal and binding on the respondent and thus the arbitrator was not entitled to fix his own charter rate.

11. The next contention of the learned counsel for the petitioner is that in so far as award made for the payment for a period of 13th to 16th year is concerned, the same is beyond the scope of his reference as what was referred to him was only the issue pertaining to the 11th and 12th year and thus, the arbitrator having travelled beyond the scope of reference, the award is liable to be quashed and set aside.

12. The last contention urged by the learned counsel for the petitioner is that in so far as the operating expenses are concerned, it is constituted of four different heads, namely, (i) wages, (ii) repairs and maintenance, (iii) insurance and (iv) over head expenses. It is not permissible for the arbitrator to apply different formula and different yard-stick in respect of repair and maintenance whereas in respect of the other over head expenses

the parties have accepted the report of the Second Saxena Committee and/or High Level Working Group.

13. The learned counsel for the respondent has contended that the issue which was referred to the arbitrator was the short and narrow issue i.e. whether the 11th year provided under the report of the committee has to be computed on the basis of date of induction and/or it has to be computed on the basis of financial year. The learned counsel for the respondent has contended before me that only the said difference and disputes between parties were required to be determined by the arbitrator as the rest of the reliefs are basically the consequential reliefs. If the date of induction has to be taken into account then the over head repair and maintenance charges which is payable to the respondent company has to be different than what is payable to the Shipping Corporation of India since the Shipping Corporation of India's 11th year from the date of induction of its ship is different than the 11th year of date of induction of ship belonging to the respondent company herein. It has been further contended by the respondent Corporation before me that if the basis of computation is taken as contended by the petitioner then in that event an absurd result is likely to be followed in as much as then the two incomparable and unequal parties are sought to be treated equally even though their ships have completed different period of

operation. It is contended that once the vessel is put in operation then the repairs required of such vessel is to be on the basis of the operation already completed. Thus, the repairs required to a ship on completion of 11 years of operation will be different than the repairs required on completion of 12 years of a period of its operation. The learned counsel for the respondent has thus contended that while considering the Second Saxena Committee's report and High Level Working Group' report what is required to be seen is that the expenses of the Shipping Corporation of India has to be taken into consideration on the basis of the year in which the vessels of the Shipping Corporation of India has completed 11th year of operation and not on the basis of 11 years having financial year 1992-93 and onwards. It is therefore, contended by the learned counsel for the respondent that there was no dispute as to the formula accepted by the Second Saxena Committee report and/or High Level Working Group Committee who notified the said formula. What was in dispute is the method and manner of implementation thereof. It is, therefore, contended by the learned counsel for the respondent corporation that there is no substance in the contention of the petitioner that the arbitrator has fixed his own charter rate by ignoring the formula as prescribed by the Second Saxena Committee report and/or the High Level Working Group constituted by the Ministry of Surface

Transport.

14. In light of the aforesaid contentions of the rival parties, I am required to determine the question of legality and validity of the award impugned herein. In so far as the contention of the learned counsel for the petitioner is concerned that the Second Saxena Committee Report and the formula adopted therein as well as the integrated report of the High Level Working Group is binding on the petitioner and consequently binding on the respondent Corporation, I find no difficulty in accepting the said argument. In fact the respondent corporation is not disputing the formula on the basis of which the said recommendations were made to reimburse the amount of over head expenses incurred by the Indian ship owners. The only dispute which is raised is that the said formula has to be applied by taking which particular year into consideration. It is because under the formula the yard-stick for reimbursement is taken on the basis of amount expended by Shipping Corporation of India which is a government of India undertaking. This formula is not in dispute. However, for applying the said formula the date of induction of ship is to be taken into consideration or merely a financial year is the bone of contention between the parties which was referred to Arbitrator. I find that even in the Award the Arbitrator has categorically stated that what is

looked into is not the legality and validity of the formula fixed but the implementation of the said formula by the respondent corporation.

15. Thus, in so far as this argument of the petitioner is concerned, I do not find any substance in the same and I accordingly reject the same.

16. Now turning to the second argument which is advanced by the learned counsel for the petitioner, namely, that the arbitrator has fixed his own charter rate, I find that the same is factually incorrect. The arbitrator has only held in so far as the repair and maintenance expenses is concerned, the relevant period of the Shipping Corporation of India which is a comparable year to the respondent herein on the basis of date of induction of the ship has to be taken into consideration. The arbitrator considered the date of induction as the relevant date and not the financial year as contended by the petitioner herein.

17. The five ships of the respondent Corporation were inducted in the year 1983 and 1984 whereas the ships of the Shipping Corporation of India were all inducted in 1984-85. The aforesaid position is an admitted fact since the same is set out by the petitioners themselves on page 7 of the petition. If, therefore, the date of induction is taken as the

relevant date then 11th year of operation of the vessel of the respondent corporation would be the 10th of the operation of the vessel of the Shipping Corporation of India. Therefore, to compute the 11th year as the base year for the purpose of next five years, it is necessary that the date of induction is taken into consideration and the 11th year of operation of the vessels of Shipping Corporation of India should be taken as 12th year of vessel operation of the respondent herein. I find that the said dispute was specifically referred to the arbitrator. Thus in my view the decision of the arbitrator is wholly within jurisdiction and is final and binding. It is well settled that the interpretation of the clause of the agreement between the parties is an exclusive domain of the arbitrator and the Court in its jurisdiction under Section 34 cannot interfere with such an interpretation even if two views are possible. In my view, the arbitrator has not himself fixed the charter rate as contended by the petitioner but only interpreted the formula prescribed by the Second Saxena Committee report as accepted by the High Level Working Group. In that view of the matter, I did not find any merit in the aforesaid contention advanced by the learned counsel for the petitioner and therefore reject the same.

18. This leads me to the next contention of the learned counsel for the petitioner that in so far as

the period of 13th to 16th years is concerned, the award of the arbitrator is beyond the scope of reference. It is contended by the learned counsel for the petitioner that what was referred to is only the determination of the right for 11th and 12th year and not for the subsequent period. The aforesaid argument has no merit because what was referred to by an order dated 7.12.2001 passed by this Court was the difference and disputes raised in the writ petition being Writ Petition No. 2788 of 2001. The prayers of the said writ petition clearly indicates that even for the year 13th to 16th year what should be the amount payable by the petitioner to the respondent was an issue which was referred to the arbitrator. Prayer clauses (a), (b), and (c) of the said petition which have been set out in earlier part of the judgment clearly indicates that both the disputes are within the jurisdiction of the arbitrator and were specifically referred to him for his determination. In view of the aforesaid position, I do not find any merit in the argument of the learned counsel for the petitioner that the arbitrator has travelled beyond the scope of reference and thus the award is liable to be quashed and set aside.

19. This takes me to the last contention raised by the learned counsel for the petitioner namely, that different yard sticks cannot be applied for computation of a year in as much as the other items

of the over heads the yard stick applies is of financial year and not on the basis of year of induction. Firstly this argument cannot be accepted for the simple reason that the item of repairs and maintenance is a separate item and did not pertain to other part of the components of the over head expenses. Thus the arbitrator himself has not gone into the said other expenses at all. Thirdly, in any event, the yard stick to be applied to the repair and maintenance of vessel has to be on the basis of operation of the vessel because more the vessel is put to operation more is the likelihood of the repairs and maintenance required to the said vessel. Thus, I am unable to accept the argument of the learned counsel for the petitioner that for the repairs and maintenance also the yard stick of the financial year should be applied irrespective of the date of induction of the said vessel.

20. In the aforesaid circumstances, I do not find any merit in the present petition. The petition is therefore accordingly dismissed. However, there shall be no order as to costs.

21. C.C. expedited.